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No. 511

In the Supreme Court of the United States

OCTOBER TERM, 1942

JOHN F. NOBLE, DOING BUSINESS AS NOBLE TRANSIT COMPANY, APPELLANT

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

In the District Court of the United States for the District of Minnesota, Third Division

Civil Action No. 281

JOHN F. NOBLE, DOING BUSINESS AS NOBLE TRANSIT COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's petition to set aside an order of the Interstate Commerce Commission entered May 13, 1941. The court's final decree was entered July 22, 1942, an appeal was allowed on August 10, the appeal papers were mailed on August 14, and were received by the Government on August 17, 1942.

Appellant, by application filed with the Commission under the "grandfather" clause of Section

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209 (a) of the Motor Carrier Act of 1935, sought a permit authorizing continuance of operations as a contract carrier by motor vehicle of general commodities in interstate commerce, with certain exceptions, between specific points and areas in the states of Minnesota, Wisconsin, Illinois, Iowa, and North Dakota, over regular and irregular routes.

The Commission (Division 5) found that in November 1934, appellant commenced operating as a motor carrier with two trucks under a written contract with Swift and Company, hereinafter called Swift, a meat-packing concern, from its plant at South St. Paul, Minnesota. It further found that in February 1935 appellant commenced hauling canned goods under a written contract with Libby, McNeil and Libby, hereinafter called Libby, which is engaged in the canning of foods and operates a plant at Blue Island, Illinois. It was also found that on June 1, 1935, appellant entered into a written contract with the Kraft-Phenix Cheese Corporation, hereinafter called Kraft, for the transportation of various articles, but that it performed no actual operations for Kraft until March 1936, as this arrangement required a change in Kraft's method of distribution. All traffic handled by appellant prior to the critical statutory date, July 1, 1935, and until October 15, 1935, was found to have been transported for Libby or for Swift or one of its subsidiaries. The Commission stated that appellant's principal operations under these contracts had consisted in rendering a specialized transpor-

tation service in hauling packing-house products from the Swift plant at South St: Paul for deliveries to Wisconsin points, following which the truck proceeded to Chicago or Blue Island to pick up loads at the plants of Swift or Libby, respectively, for delivery into Minnesota. The shipments from Blue Island were found to have consisted only of canned foods, but from Chicago and South St. Paul they were found to have consisted of canned goods, meats, various packing-house products, dairy products, and innumerable supplies used in conjunction with the manufacture or distribution of those products. While the Commission acknowledged that appellant had transported a wide range of commodities, it found that "the service rendered by applicant has not been similar to that of a common carrier of general commodities, but rather that of a carrier of canned foods, packing-house and related products, and supplies in the manner hereinbefore described."

On the basis of these and other subordinate findings the Commission made the following ultimate finding:

> *Findings.*—We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in section 203 (a) (1) of the act) who operate food canneries or meat-packing businesses, (a) of canned foods from Blue Island, Ill., to St. Paul,

South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packinghouse products and supplies, from South St. Paul, to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wis., and U. S. Highway 53 from La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis.; over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied.

The Commission's order was thereupon issued to limit appellant's operations in accordance with the above findings.

The District Court in its opinion stated that appellant claimed to have made subsequently to the "grandfather" date approximately 120 contracts with shippers for transportation, more than 80 of which are still in existence. This brought appellant into competition with common carriers and certain common carrier trucking associations intervened as defendants before the District Court. A contract carrier association and Kraft intervened on behalf of plaintiff below.

The decree of the court below sustaining the Commission's order should be affirmed without argument because the appeal therefrom presents no substantial question. Two principal arguments were made before the lower court: (1) appellant, while admitting that the Commission might specify, in a "grandfather" contract carrier permit, the classes of property to be carried, contended that the Commission was without authority to restrict the permit to carriage for certain designated classes of shippers; and (2) the Commission's action in refusing to consider the Kraft contract service part of appellant's legitimate "grandfather" operations, and in treating such service as an unauthorized extension of operations was challenged.

(1) Section 209 (a) of the Motor Carrier Act, 49 Stat. 552, 49 U. S. C. § 309, prohibits the operation of contract motor carriers in the absence of a permit from the Interstate Commerce Commission; the "grandfather" clause provides for the issuance of permits without proof of public interest and other matters for operations carried on before July 1, 1935. Section 209 (b) states that "the Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof." * * * This requirement clearly applies to "grandfather" permits as well as to others.

The Commission in this case, applying the principles set forth in *Keystone Transportation Com-*

pany Contract Carrier Application, 19 M. C. C. 475,[1] limited the scope of the permit to the classes of shippers with which appellant had made contracts before the "grandfather" date. The question is whether the "business of the contract carrier" and "the scope thereof" may be defined in this manner, as well as by territorial and commodity restrictions. A contract carrier as distinguished from a common carrier, deals with particular shippers. As Commissioner Eastman stated in his concurring opinion in the *Keystone* case, 19 M. C. C. 499:

> * * * the phrase "the business of the contract carrier * * * and the scope thereof" means more than "just the business of being a contract carrier within a defined territory" and connotes in addition the "exact and precise character of the service to be rendered by such carrier." If * * * the "exact and precise character" of that service can sometimes be closely and accurately defined only by reference to the class of shippers that was being or is to be served, there is nothing whatever in the act which precludes us

[1] In the Keystone decision, the Commission overruled a dictum in *Longshore Contract Carrier Application*, 2 M. C. C. 480. Although one sentence of the *Longshore* opinion indicated an "unduly narrow" construction of Section 209 (b), that case held only that a permit could not be limited by name to the shipper with whom a previous contract had been made. This, of course, was correct. See Section 209 (b) (proviso).

from so defining it, and in fact it is our duty to do so.

If the business of a contract carrier could not be so defined, companies transporting many types of commodities under contract with a single chain store (as in the *Keystone* case), or for one or two manufacturing concerns dealing in many products (such as Swift & Co. in the present case), would be entitled to the equivalent of a general license allowing them to carry all such commodities for all shippers. In such circumstances, a permit not limited to the class of shippers under contract on the "grandfather" date would not accurately define the scope of an applicant's prior operations or preserve the "parity between future operations and prior *bona fide* operations which the statute contemplates." *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 22.[2]

[2] In his concurring opinion in the *Keystone* case, Commissioner Eastman declared in this connection:

"When it is considered how extensive the list of commodities is which comes 'within such commodity description,' it becomes evident that such a permit would for practical purposes be equivalent to a grant of authority to transport as a contract carrier commodities in general within the specified territory. I submit that in the case of the new operations there is no proof whatever justifying the conclusion that such a grant would be 'consistent with the public interest and the policy declared in section 202 (a).' In the case of the 'grandfather' operations, I submit that such a permit would specify and define a 'business of a contract carrier' which is far broader than the business in which applicants have actually been engaged."

(2) The claim that the Commission improperly rejected the Kraft service as part of the service within the "grandfather" rights is groundless. These operations were not actually begun until nearly eight months after the critical statutory date, even though the contract was entered into one month before. The "grandfather" clause applies only to "actual," not "potential" service on the critical date and continuously thereafter. *Mac Donald* v. *Thompson*, 305 U. S. 263, 266; *Gregg Cartage & Storage Co.* v. *United States*, No. 535, 1941 Term.

Appellant also argues that the territory in which operations might be conducted was unduly circumscribed, that its operations with Swift, Libby, and Kraft were merely incidental to its *bona fide* operation as a carrier of general commodities, and that Swift and Company is not merely a meat packing concern and Libby not merely a food cannery. The Commission's findings to the contrary are amply supported by the evidence, and the lower court so found. Appellant also contends that he was deprived of his constitutional right to a fair hearing in that he was not allowed oral argument, or to submit a written brief, on his petition for reconsideration of the order of Division 5. Due process does not require argument, written or oral, on an application for rehearing. Furthermore, the petitions for reconsideration themselves constituted a

written statement of appellant's position. Cf. *Morgan* v. *United States*, 298 U. S. 468, 481.

For the foregoing reasons it is evident that the errors assigned by appellant are without substance. It is respectfully submitted that the judgment of the district court should be affirmed.

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